the issues argued in the Petition for Writ of Certiorari relating to the decision of the New Jersey Federal District Court. As a result, the sole issue that remains open for consideration in the Petition for Writ of Certiorari is whether the analysis of general personal jurisdiction includes considerations of "reasonableness" or "fairness". On this issue, it is the Petitioners' position that a court applying a general jurisdiction long arm statute should ignore whether a finding of such jurisdiction would be reasonable or fair. As shown below, since there are no compelling reasons for granting a Writ of Certiorari for any of the arguments proffered by the Petitioners, the Petition should be denied.

STATEMENT OF THE CASE

1. THE ILLEGAL FLIGHT

On March 20, 1999, the Petitioner Theodore Koziol flew in the state of New Jersey as a passenger in a borrowed home built aircraft. NTSB Rpt. p. 1, NJ-00 Dkt. 48. The pilot informed the Petitioner Koziol before the flight commenced that the aircraft was not legal to fly under applicable Federal regulations because it carried too much fuel to qualify as an ultralight aircraft. *Id.* at p. 1d. Additionally, the flight was illegal because FAA regulations only allow dual occupancy of an ultralight (if otherwise legal, which this was not) for purposes of flight instruction, and Koziol emphatically denied to the NTSB that he was a student on the flight. *Id.* at pp. 1 & 1d.

On the day of the flight, the pilot initially told the Petitioner Koziol that the flight must be cancelled due to high winds, but later in the day the flight proceeded

after the pilot looked toward the windsock and said he "thought it would be all right to fly." *Id.* at p. 1. After the Petitioner Koziol was outfitted to fly, the engine was started, and then the engine stopped while the airplane was still on the ground. *Id.* According to the Petitioner Koziol, "[t]he motor was restarted, but no one said anything as to why it stopped." *Id.*

The aircraft headed down the runway for a downwind takeoff. *Id.* at p. 1a. As the takeoff roll commenced, the Petitioner Koziol felt gusts of wind. *Id.* Once airborne, while still flying downwind, the aircraft began to turn right. *Id.* The Petitioner Koziol described to NTSB what he experienced while in the right turn back towards the wind: "[i]t felt like a gust of wind turned the airplane to the right, and other gusts were forcing the airplane up and down." *Id.*

A witness said the plane reached an altitude of roughly 60 to 70 feet over 40 foot trees with the engine on. *Id.* at p. 1a. While in a right turn the engine stopped. *Id.* According to a witness, the plane glided for about two to four seconds after the stoppage, then began a gradual turn. *Id.* The turn increased sharply, and the plane "appeared to half-cartwheel." *Id.* According to the Petitioner Koziol, the pilot did not make any attempt to restart the engine.[5] *Id.* The Petitioner Koziol felt the aircraft "go out of control", and the aircraft impacted the ground. *Id.*

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[5] Prior to the accident, the Pilot had been quoted in a New Jersey newspaper as saying, "You're in control of your safety. You're as safe as your skill and training. Your engine could stop, but it means nothing. You can easily glide down to a safe landing if you have the skills." (NTSB Rpt., p. 1b, NJ-00 Dkt. 48).

II. KODIAK'S SALE OF THE ENGINE IN THE BAHAMAS

Kodiak, a Bahamian corporation with its principal place of business in Nassau, Bahamas, sells engines in the Bahamas. Ronveaux Afft. ¶¶ 1,5, FL-02 Dkt. 23. Kodiak sold a Bombardier-Rotax 582-UL light-aircraft engine serial number 5162734 (the "Engine") in the Bahamas to South Mississippi Light Aircraft ("South Mississippi"). *Id.* at ¶7. Title to the Engine passed to South Mississippi in the Bahamas, and Tropix Air Limited, ("Tropix Air"), another Bahamian company, shipped the Engine in question FOB Nassau, Bahamas to South Mississippi. *Id.* at ¶ 5; Burrows Afft. ¶¶ 12-15, FL-02 Dkt. 37. Kodiak paid Tropix Air for the shipment in Bahamian dollars by transferring the funds from Kodiak's Bahamian bank account to Tropix Air's Bahamian bank account. Burrows Afft. ¶¶ 12-16, FL-02 Dkt. 37.

Tropix Air then delivered the shipment to Miami, Florida, at which point, Tropix Express, Inc. ("Tropix Express"), a separate Florida corporation, received the shipment. *Id.* at ¶ 10-13. Tropix Air unilaterally decided to use Florida as the point of entry into the United States based on its relationship with Tropix Express, an independent Florida corporation with which Tropix Air unilaterally contracted for delivery. *Id.* at ¶ 6-7, 12-13. Tropix Express then took delivery of the goods as a freight forwarder and collected its shipping expenses from South Mississippi. *Id.* ¶ 15.

As shown above, Kodiak's involvement in the sale of the Engine ended when the Engine was purchased in the Bahamas by South Mississippi. Kodiak was not involved with the shipment of the

Engine into the United States since that was handled by Tropix Air, on behalf of South Mississippi. Kodiak was not involved with the transportation of the Engine in the United States since that was handled by Tropix Express, on behalf of Tropix Air. Kodiak had nothing to do with the installation of the Engine into the ultralight aircraft since it was an illegally constructed home built aircraft, which was not even legal to fly, let alone with a passenger.

Accordingly, there is no basis for the Petitioners to assert personal jurisdiction over Kodiak – as found by two Federal District Courts and one Circuit Court of Appeal.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT AMONG THE CIRCUITS AS TO THE UNAVAILABILTY OF DIRECT APPELLATE REVIEW OF A TRANSFER ORDER ENTERED BY A TRANSFEROR DISTRICT COURT LOCATED IN A DIFFERENT REGIONAL CIRCUIT.

Contrary to the assertion of Petitioners, the circuits are unanimous that the appellate review of a transfer order entered by a transferor district court located in a different regional circuit may not be the subject of a direct appeal in the transferee circuit. Instead, the party seeking to preserve the issue for appeal must move for re-transfer in the transferee court. *See, e.g., Reyes v. DEA*, 834 F.2d 1093, 1095 (1st Cir. 1987) (challenge to transfer in transferee circuit needed to preserve for review); *Songbyrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 177 (2d Cir. 2000) (re-transfer motion is required citing collected cases),

cert. denied, 531 U.S. 824 (2000); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 765-776 (3d Cir. 1984) (re-transfer motion and mandamus upon denial required to appeal transfer order); *In re Carefirst of Maryland, Inc.*, 305 F.3d 253, 259 (4th Cir. 2002) (indirect review of transfer order available on denial of motion to re-transfer); *Painewebber, Inc. v. Chase Manhattan Private Bank*, 260 F. 3d 453, 458-59 (5th Cir. 2001)(motion to retransfer prior to addressing merits of transfer on appeal); *Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1136 (6th Cir. 1991) (indirect review on denial of motion to re-transfer), *cert. denied*, 502 U.S. 821 (1991); *National-Standard Co. v. Adamkus*, 881 F.2d 352, 356 (7th Cir. 1989) (transfer order not subject to review without motion to re-transfer) (citing 15 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 3846 at 359-60 (1986)); *In re Nine Mile Limited*, 673 F.2d 242, 244 (8th Cir. 1982) (motion to re-transfer appropriate method to seek review of transferred file (citing Wright and Miller § 3846)); *Posnanski v. Gibney*, 421 F.3d 977, 980-81 (9th Cir. 2005) (transferee circuit may only review denial of motion to re-transfer, not out of circuit transferor court order of transfer (citing Wright and Miller § 3846)); *FDIC v. McGlamery*, 74 F.3d 218, 222 (10th Cir. 1996) (re-transfer motion required for indirect review of transfer order for lack of personal jurisdiction); *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 989 (11th Cir. 1982) (motion to re-transfer appropriate means of seeking appellate review of outside circuit transfer order); *Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (motion to re-transfer appropriate course of action to preserve issue for review by transferee

circuit).[6] Where, as here, the Petitioners never sought re-transfer the issue is waived. *See, e.g., National-Standard*, 881 F.2d at 356 (right to appeal transfer waived when record shows no attempt to object to transfer order prior to appeal).

Since the Petitioners failed to make a motion to re-transfer the case back to the New Jersey Federal District Court, the Eleventh Circuit was following settled precedent when it dismissed the appeal as to issues relating to the transfer order entered by the New Jersey Federal District Court. Pet.App. 16a.

The Petitioners cite many cases in support of their contention that pre-transfer orders may be reviewed by the Circuit Court presiding over the transferee district court. However, none of the cited cases are applicable to the instant case involving the attempt by Petitioners to appeal the transfer order itself. For example, in *Chaiken v. VV Publishing Corp.*, 119 F.3d 1018, 1024-25 (2d Cir. 1997), *cert. denied*, 522 U.S. 1149 (1998) (Petition, at 13), the interlocutory order dismissing some, but not all, of the defendants was entered over eight months before the agreed transfer order was entered and was unrelated to the reason for the transfer. *Id.* The propriety of the transfer order itself was not appealed. *Id.* at 1025.

In other cases cited by Petitioners, the rulings by the respective transferor courts were on substantive legal issues whose determination was incorporated into the final judgment, rather than as here where the issues sought to be appealed relate only to the propriety of the transfer itself and have no bearing on the merits. *See, e.g., Tel-Phonic Services, Inc. v. TBS*

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[6] Public records indicate that Federal Circuit decisions are likewise in accord with the above-cited decisions.

Int'l, Inc., 975 F.2d 1134, 1137 (5th Cir. 1992) (dismissal of RICO claims); *Equal Employment Opportunity Comm'n v. Northwest Airlines, Inc.*, 188 F.3d 695, 697 (6th Cir. 1999) (summary judgment on sexual harassment claims); *Astarte Shipping Co. v. Allied Steel & Export Svc.*, 767 F.2d 86, 87 (5th Cir. 1985) (maritime attachment); Petition, at 13-14.

In sum, all of these cases are unlike the present case in which the Petitioners, by their own request to the New Jersey Federal District Court timely modified the final dismissal order into a transfer order, which they now seek to appeal. Had the Petitioners elected to appeal the final dismissal to the Third Circuit, they could have done so since that final dismissal closed the case (Kod.App. 1b-2b) and was appealable at the time. In fact, the Petitioners had until May 24, 2003 to take the appeal to the Third Circuit, and instead rushed to modify the April 24, 2003 order, which they succeeded in doing on May 22, 2003, obviously in order to get a transfer in place prior to the expiration of the appeal period.

The sole case cited by Petitioners which appears to support appellate jurisdiction over an out-of-circuit transfer order is *American Fidelity Fire Insurance Co. v. USDC for the Northern Dis. of Cal*, 538 F.2d 1371 (9th Cir. 1976) (Petition, at 14). An examination of that ruling shows that the court's commentary arose as dicta in the consideration of a writ of mandamus directed to a transfer order entered by a district court within the Ninth Circuit, and cited only two supporting references, both mandamus cases involving requests for mandamus to prevent transfers from district courts within the respective appellate court's circuit. *Id.* at 1377 n.4. Though not mentioned by the Petitioners, the Ninth Circuit has since rejected the *American Fidelity*

logic, holding that that "[o]ur statement in footnote four was both overbroad and dicta". *Posnanski*, 421 F.3d at 979.

Thus, the cases cited by the Petitioners do not reflect a split in the circuits, but more importantly to this appeal address wholly different situations than the one faced by the Eleventh Circuit in this case. Since there is no split among the circuits as to the actual issue at hand, there is no compelling reason for this Court to grant the Writ of Certiorari based on the Eleventh Circuit's correct dismissal of Petitioners' improper attempt to appeal the ruling of the New Jersey Federal District Court dismissing and transferring the case to Florida.

II. THE PETITIONERS' ADMIT THAT THE TRANSFER OF THE NEW JERSEY ACTION TO FLORIDA ELIMINATED ANY INJUSTICE CAUSED BY THE FINDING THAT THE NEW JERSEY FEDERAL DISTRICT COURT LACKED PERSONAL JURISDICTION OVER THE DEFENDANTS.

In their reply brief to the New Jersey Federal District Court in support of their motion to transfer the dismissed case to the Florida Federal District Court, the Petitioners state that "granting [Petitioner's] relief from the Court's April 24, 2003 Order under Federal Rule of Civil Procedure 59(e) or 60(b) *will eliminate any injustice* caused by dismissing, for lack of personal jurisdiction, this otherwise timely action."[7]

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[7] Plaintiffs' Reply in Support of Their Motion, Pursuant to Fed.R.Civ.P. 59(e) and Fed.R.Civ.P. 60(b), for Relief from the Dismissal Order Entered on April 24, 2003, at pp. 3-4, NJ-00 Dkt.111 (emphasis added).

Since the New Jersey Federal District Court granted the transfer of the dismissed action from New Jersey to Florida, the New Jersey Federal District Court, by the Petitioners' own admission, eliminated any injustice caused by the decision entered by the New Jersey Federal District Court dismissing the claims for lack of personal jurisdiction for which the Petitioners failed to take an appeal to the Third Circuit at the time of the dismissal.

Moreover, the reason the Petitioners sought to have the dismissed New Jersey litigation transferred to Florida, rather than closed as originally done by the New Jersey Federal District Court (Kod.App. 1b-2b), was not for purposes of further litigating jurisdictional issues relating to New Jersey. Rather, the Petitioners sought to obtain the benefit of the April 24, 2000 filing date for their otherwise time-barred litigation pending in the Florida Federal District Court. Motion to Modify, at 4-5 ("If the Court exercises its power to transfer the complaint to the Southern District of Florida, the defendants will not be able to claim that the action filed in Florida is untimely."). As represented by Petitioners to the New Jersey Federal District Court, the transfer to Florida "will not change the substance of this Court's finding of lack of jurisdiction in New Jersey", but rather it will provide protection to the Petitioners if the defendants in Florida challenge the Florida complaint based on the statute of limitations. *Id.* at 7-8. The Petitioners' remained satisfied to litigate in Florida up until the day that the Florida Federal District Court ruled against them, as is shown by their decision not to move for re-transfer. However, once the adverse ruling was entered by the Florida Federal District Court, it was too late to change their minds and the issue was not

preserved for appeal.

Since the Petitioners obtained the transfer they requested from the New Jersey Federal District Court, there is no compelling reason for this Court to grant a Writ of Certiorari to address any issues relating to the decision by the New Jersey Federal District Court.

III. THE PETITIONERS CANNOT CLAIM ERROR REGARDING THE APPLICATION OF THE *ASAHI METAL* OPINION IN THIS CASE.

A. The Petitioners' Arguments Below Applied Justice O'Connor's Opinion To The Facts And Never Raised The Concurring Opinions Of Justices Brennan And Stevens.

Without mentioning to the New Jersey Federal District Court this Court's plurality opinion in *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102 (1987), the Petitioners argued that the defendants "engaged in additional conduct with the forum State of New Jersey beyond placing the product into the stream of commerce." Pet.App. 28a n.6. Since the Petitioners argued in favor of personal jurisdiction under the standard set forth by Justice O'Connor in the *Asahi Metal* plurality opinion, they cannot now argue that the application of that jurisdictional standard was incorrect.

On appeal to the Eleventh Circuit, the Petitioners presumed that the Third Circuit would adopt the standard set forth by Justice O'Connor in the *Asahi Metal* plurality opinion, once again never argued against the application of that standard, and cited

factual references in support of the jurisdictional analysis articulated in Justice O'Connor's plurality opinion in *Asahi Metal.*[5]

Now, for the first time, the Petitioners contend that "the view of stream of commerce set out in the two concurring opinions in *Asahi Metal* by Justices Brennan and Stevens should control." (Petition, at 17). Since "this argument was neither raised nor considered below" Kodiak submits that this Court should decline to consider this point. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999). In other instances in which a party has failed to raise an argument below, this Court has declined to consider the point on appeal. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *Grupo Mexicano*, 527 U.S. at 318 n.3. Accordingly, since the Petitioners are presenting an issue that was not presented to any of the courts below, there is no compelling reason for this Court to grant a Writ of Certiorari on this point.

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[5] Petitioner's Brief to Eleventh Circuit, 11th Cir. Dkt. June 21, 2004, at 24.

B. Despite The Failure Of The Petitioners To Advocate In Favor Of The Concurring Opinions Of Justices Brennan And Stevens In The *Asahi Metal* Case, The New Jersey Federal District Court Opinion Found That Personal Jurisdiction Was Lacking Even Under The Concurring Opinions Of Justices Brennan And Stevens.

Since the New Jersey Federal District Court determined that the Petitioners lacked personal jurisdiction over the defendants under *both* Justice O'Connor's plurality opinion (Pet.App. 38a) as well as the concurring opinions of Justices Brennan and Stevens (Pet.App. 38a-39a n.10) there is no compelling reason for this Court to grant the Petition for Certiorari. Contrary to the assertion of the Petitioners in their Petition for Certiorari, the New Jersey Federal District Court did not apply only the plurality opinion of Justice O'Connor, but rather it applied all of the opinions in the *Asahi Metal* case.

The Third Circuit in *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 207 n.11 (3d Cir. 1998) (Petition, at 17), stated that "[t]he clear satisfaction of both the O'Connor and the Brennan standards obviates any need to adopt one over the other." Here, the failure of the Petitioners to establish jurisdiction in New Jersey under any of the three opinions in the *Asahi Metal* case, obviated both the need for the lower courts to select one standard over another and the need for this Court to grant certiorari to resolve the issue.

In any event, many of the circuit courts considering the proper analysis of personal jurisdiction

post-*Asahi Metal* have applied the type of standard articulated by Justice O'Connor in requiring a plaintiff to establish more than merely a stream of commerce to sustain personal jurisdiction over a defendant. *See, e.g., Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 451-52 (3d Cir. 2003) (requiring more than merely stream of commerce to sustain personal jurisdiction); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (same); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945-47 (4th Cir. 1994) (same), *cert. denied*, 513 U.S. 1151 (1995); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992) (*Asahi Metal* did not change requirement in circuit that personal jurisdiction be based on more than merely stream of commerce); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375 (8th Cir. 1990) (requiring more than merely stream of commerce to sustain personal jurisdiction); *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990) (applying Justice O'Connor's standard for personal jurisdiction).

Since the New Jersey Federal District Court utilized both standards to review the factual allegations of the Petitioners and many of the circuits to have addressed this issue, including both the Third Circuit and Eleventh Circuit, are in conformity with the application of the plurality opinion of Justice O'Connor, there is no compelling reason for this Court to grant a Writ of Certiorari to address the plurality opinion in *Asahi Metal*.

C. The Plurality Nature of the *Asahi Metal* Opinion Does Not Impact Upon The Dismissal Of The Petitioners' Florida Action Since That Dismissal Was Based On The Portion Of Justice O'Connor's Opinion In Which All Justices Concurred.

As to the failure of Petitioners to establish jurisdiction over the defendants in Florida, this portion of the *Asahi Metal* opinion is not at issue in reviewing the decisions of the Florida Federal District Court or the Eleventh Circuit. Both of those decisions were based on the failure of the Petitioners to establish that the traditional notions of fair play and substantial justice are satisfied. Specifically, the Eleventh Circuit opinion stated that "even if . . . the Florida long-arm statute conferred jurisdiction, we agree with the district court that the exercise of jurisdiction would offend traditional notions of fair play and substantial justice." (Pet.App. 7a-8a).

Accordingly, there is no compelling reason for this Court to grant a Writ of Certiorari to examine this aspect of the *Asahi Metal* decision.

IV. THERE IS NO BASIS FOR THIS COURT TO REVIEW THE APPLICATION OF A TWO-PART JURISDICTIONAL TEST TO CLAIMS OF GENERAL PERSONAL JURISDICTION.

A. The Eleventh Circuit's Opinion Was Based On The Failure Of Petitioners To Establish Jurisdiction Under the Florida Long Arm Statute And Whether Asserting Personal Jurisdiction Would Offend Traditional Notions Of Fair Play And Substantial Justice Was Merely An Additional Point Of Consideration.

A review by this Court of whether a jurisdictional analysis should include consideration of the factors of fair play and substantial justice would not affect the outcome of the personal jurisdiction dispute between the parties in this action. The Eleventh Circuit determined that the Petitioners failed to prove the first prong of the jurisdictional analysis, namely whether the Petitioners established "specific jurisdiction" pursuant to the Florida long-arm statute (Fla. Stat. § 48.193(1)(a)) or "general jurisdiction" pursuant to the Florida long-arm statute (Fla. Stat. § 48.193(2)). Pet.App. 5a-7a. Having determined that the Petitioners failed to establish the first prong of the jurisdictional test, there was no need for the Eleventh Circuit to consider any further jurisdictional analysis. Since any finding by this Court regarding the propriety of examining "traditional notions of fair play and substantial justice" in the context of a general jurisdiction analysis would have no effect on the result in this case, there is no compelling reason for this Court to grant a Writ of Certiorari to address this issue.

B. Constitutional Due Process Requirements Must Apply To The Analysis Of General Jurisdiction.

There is no compelling reason for this Court to address the application by the Eleventh Circuit of a two-part jurisdictional analysis in general jurisdiction cases. Whether addressed as part of a statutory analysis or independently, Due Process considerations are part of every jurisdictional analysis. Respondents have reviewed many decisions in which courts specifically recognize that a general jurisdiction analysis includes determining whether asserting personal jurisdiction in the forum state would be reasonable, such that it does not offend traditional notions of fair play and substantial justice. *See, e.g., Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980); *Harlow v. Children's Hospital*, 432 F.3d 50, 57-58 (1st Cir. 2005); *Intera Corp. v. Henderson*, 428 F.3d 605, 615-16 (6th Cir. 2005); *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162, 1166-67 (11th Cir. 2005); *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1073-74 (8th Cir. 2004), *cert. denied*, 125 S.Ct. 1304 (2005); *Freudensprung v. Offshore Tech. Svcs., Inc.*, 379 F.3d 327, 343 (5th Cir. 2004).

As clearly articulated in a portion of Justice O'Connor's opinion in *Asahi Metal* joined by all Justices, "[t]he strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction over Asahi under circumstances that would offend "'traditional notions of fair play and substantial justice.'" *Asahi Metal*, 480 U.S. at 113 (citation omitted). The constitutional mandates of the Due Process clause must be complied with by all parties seeking to assert personal jurisdiction over a party.

In *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), this Court reiterated the settled principle that "[i]n what has become the classic expression of the criterion, we said in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), that a state court's assertion of personal jurisdiction satisfies the Due Process Clause if it does not violate '"traditional notions of fair play and substantial justice."'" *Burnham*, 495 U.S. at 609 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

Some court opinions have condensed the factual analysis under a long arm statute with the due process analysis, especially in instances in which the conduct of the defendant satisfies both statutory and constitutional requirements for personal jurisdiction. *See, e.g., AutoNation, Inc. v. Whitlock*, 276 F.Supp.2d 1258, 1262 (S.D. Fla. 2003); *Nichols v. Paulucci*, 652 So.2d 389, 391 (Fla. 5th DCA), *rev. denied*, 659 So.2d 1088 (Fla. 1995), *cert. denied*, 516 U.S. 1046 (1996). However, this does not eliminate the requirement that the court examine Due Process requirements in determining whether a defendant is subject to personal jurisdiction. *See Burnham*, 495 U.S. at 609.

Accordingly, there is no compelling reason for this Court to grant a Writ of Certiorari to address the personal jurisdiction analysis performed by the Eleventh Circuit since it comports with the Due Process analysis established by the Constitution and followed by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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1b

Filed 4/24/2003

Civ. No. 00-1938 (GEB)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THEODORE KOZIOL and LOIS KOZIOL,
Plaintiffs,

v.

BOMBARDIER-ROTAX GmbH MOTORENFABRIK; BOMBADIER INC., KODIAK RESEARCH LTD.; and ROTECH RESEARCH CANADA LTD., a/k/a KODIAK RESEARCH CANADA, LTD.
Defendants.

ORDER

This matter comes before the Court upon the motions to dismiss by defendants, Bombardier-Rotax Gmbh Motorenfabrik; Bombadier Inc., Kodiak Research Ltd.; and Rotech Research Canada Ltd, a.k.a. Kodiak Research Canada, Ltd. on plaintiffs' complaint; and the Court having considered the parties' submissions; and having heard oral argument on March 3, 2003; and for the reasons stated in the Memorandum Opinion accompanying this order;

IT IS this 23rd day of April, 2003

ORDERED that defendants' motions to dismiss are GRANTED; and it is further
ORDERED that the clerk should mark this case

CLOSED.

s/
GARRETT E. BROWN, JR., U.S.D.J.

No. 05-633

In The Supreme Court of the United States

THEODORE KOZIOL and LOIS KOZIOL,

Petitioners,

vs.

BOMBARDIER-ROTAX GmbH MOTORENFABRIK; KODIAK RESEARCH, LTD.; ROTECH RESEARCH CANADA LTD., a/k/a KODIAK RESEARCH CANADA, LTD.; AERO DISTRIBUTION LIMITED; AERO DISTRIBUTION INTERNATIONAL LIMITED; and PASCAL RONVEAUX,

Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT BOMBARDIER-ROTAX GmbH MOTORENFABRIK'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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February 17, 2006

QUESTIONS PRESENTED

Respondent submits the following questions more accurately reflect the issues to be decided by the Court in determining whether to grant the Petition for Certiorari.

1. Whether there is a conflict among the circuits regarding a circuit court's appellate jurisdiction to review an immediately appealable pre-transfer order by a transferor district court located outside the circuit?

2. Whether this case is an appropriate vehicle for review of *Asahi Metal's* stream of commerce analyses?

3. Whether the Eleventh Circuit adhered to this Court's well-settled precedent in concluding the Florida District Court lacked personal jurisdiction over Respondent?

LIST OF ALL PARTIES IN COURT BELOW

Petitioners correctly identify the parties in the court below. Pet. at iii.

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STATEMENT OF THE CASE

Petitioners' procedural history of the case and statement of opinions below are largely correct, except Petitioners misstate the date of the New Jersey District Court's order dismissing the Complaint for lack of personal jurisdiction. Petitioners state this opinion was entered on April 24, 2004. The correct date, however of this opinion is April 24, 2003. Pet. App. 20a. Although Petitioners' history of the case is largely correct in what it does say, it omits important points. Consequently, rather than restate the entire case history, Respondent Bombardier-Rotax GMBH Motorenfabrik ("Respondent") will focus on Petitioners' omissions.

On March 20, 1999, an ultra-light aircraft containing an engine manufactured by Respondent, in which Petitioner Theodore Koziol was a passenger, crashed in New Jersey. Petitioners, residents of New Jersey, filed a products liability action against Respondent and some of its distributors in the United States District Court for the District of New Jersey based on diversity of citizenship. Pet. at 3.

Respondent is an Austrian corporation with its principal place of business in Gunskirchen, Austria. Pet. App. 53a. It manufactures ultra-light engines in Austria and sells some of its engines to Kodiak Research Ltd. ("Kodiak"), a Bahamian corporation with its principal place of business in the Bahamas. Pet. App. 55a - 56a. Kodiak distributes some of Respondent's engines pursuant to an international distribution agreement that permits but does not require Kodiak to distribute Respondent's engines in the territories of North and South America, which may include the United States, Brazil, Chile, Argentina and Colombia. Pet. App. 44a - 45a, 55a - 56a. In the instant case, Respondent sold the subject engine to Kodiak pursuant to the international distribution agreement. Pet. App. 65a. As in all cases where Kodiak purchases engines from it,

Respondent sold and transferred title to the subject engine to Kodiak in Austria. Pet. App. 55a - 56a.

After Petitioners filed suit in the New Jersey District Court, all defendants moved to dismiss the complaint for lack of personal jurisdiction. Before the New Jersey District Court ruled on Respondent's motion to dismiss, Petitioners filed another complaint (a "saving action") against Respondent in the Southern District of Florida. On April 24, 2003, the New Jersey District Court granted all defendants' motions to dismiss for lack of personal jurisdiction, finding all defendants lacked minimum contacts with New Jersey. Pet. App. 20a - 39a. The April 24, 2003 order dismissing the Complaint states it is "ORDERED that defendants' motions to dismiss are GRANTED; and it is further ORDERED that the clerk should mark this case CLOSED." Resp. App. 16a - 17a.

In its April 24, 2003 opinion supporting its dismissal of the Complaint for lack of personal jurisdiction, the New Jersey Court, adopting the steam of commerce view stated in Justice O'Connor's plurality opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of Calif., Solano Co.*, 480 U.S. 102 (1987), held all defendants lacked minimum contacts with the state of New Jersey. The New Jersey Court found that Respondent's mere knowledge that the stream of commerce may sweep its engines into New Jersey, absent other additional conduct showing purposeful availment, was insufficient to establish minimum contacts consistent with Due Process. Pet. App. 29a - 30a.

Notably absent from the Petition is any explanation of the reasons why the New Jersey Court adopted Justice O'Connor's view of stream of commerce over the views of the other plurality opinions in reaching its decision that Respondent lacked minimum contacts with New Jersey. Such an explanation is essential to a full understanding of the

New Jersey District Court's decision finding a lack of personal jurisdiction over the foreign defendants in this case.

In explaining, in footnote 6 of its April 24, 2003 opinion, why it adopted Justice O'Connor's stream of commerce view, the New Jersey District Court expressly considered the opinions that Justice Brennan and Justice Stevens authored in *Asahi Metal*:

> There are two other standards based on the stream of commerce theory found in *Asahi* . . . Justice Brennan opined that additional conduct in the forum state did not have to be shown . . . [because] awareness that the final product is being marketed in the forum state is sufficient . . . [however] Justice Brennan determined that jurisdiction was not appropriate over Asahi because it would not comport with 'fair play and substantial justice' . . . Justice Stevens . . . [concluded] that additional conduct with the forum state was not necessary to the Court's determination . . . [but held] jurisdiction over Asahi cannot be exercised because it would be 'unreasonable and unfair.'
>
> Pet. App. 28a.

After considering the differing views of stream of commerce set forth in *Asahi Metal*, the New Jersey Court explained the Third Circuit had not yet adopted any one approach from *Asahi Metal.* Pet. App. 28a. Significantly, the New Jersey Court decided to adopt Justice O'Connor's stream of commerce view in this case because *Petitioners* themselves had argued throughout the case that the defendants engaged in "additional conduct" in New Jersey sufficient to establish minimum contacts. Footnote 6 of the New Jersey Court's opinion further states: